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No. 92-1179

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JEROME ISODORE KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE GOVERNMENT MAY BRING CCE PROSECUTIONS (21 U.S.C. 848) OF RETAIL CHEMICAL SUPPLIERS WHO ARE NOT INVOLVED IN THE ILLEGAL MANUFACTURE OF CONTROLLED SUBSTANCES.

The Government premises its reply on the predicate that there is "sufficient proof to satisfy all of the elements of the CCE offense." Gov't Brf., 7. An examination of the elements of the CCE statute belies the claim that its scope covers principals of businesses which are not involved in drug

manufacturing, importation or distribution, but rather whose only role is that of raw materials supplier to those actually engaged in illicit drug manufacture.[1]

A. 21 U.S.C. § 848 (C) Was Not Intended to Apply to Businesses Which Only Supply Non-Controlled Equipment and/or Precursors to Illicit Drug Manufacturers.

Title 21 § 848 (c) (2) (A) defines a Continuing Criminal Enterprise violator as one who:

> (1) **he** violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony [sic], and
>
> (2) **such violation** is a part of a continuing series of **violations of this chapter** or subchapter II of this chapter --

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[1] The cases interpreting the CCE state the obvious -- it was a "carefully crafted" statute aimed at those importing, distributing or manufacturing prohibited drugs on a continuing, widespread, substantial and supervisory basis. See Pet., 20, fn. 13. As noted in Pet., 13, fn. 6, Congress passed legislation in the Omnibus Drug Initiative Act of 1988 (102 Stat. 4181 **et seq**), which took effect in March of 1989, which for the first time made it a violation of the Controlled Substances Act to possess or distribute a listed chemical "knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance...." 21 U.S.C. 841(d)(2). "Listed chemical" precursors for methamphetamine were added to Title 21 to include ephedrine and hydriotic acid. 21 U.S.C. 802 (34)(C) & (X). Thus, it is still not a federal crime to sell unlisted chemicals even with reasonable cause to believe of their intended illicit use. Yet, that is exactly was petitioner was given CCE status for doing!

> (A) **which are undertaken by such person in concert with five or more other persons** with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management,...." [emphasis added].

A necessary element of a CCE requires personal supervision by the manager of five others in the continuing series of drug violations prohibited by Title 21. It is thus farfetched for the Government to suggest that making a CCE kingpin out of a person whose otherwise legitimate business supplies unregulated precursor chemicals to illicit drug manufacturers. For the latter, the Government argues that a kingpin may be found to have personally supervised five or more persons in undertaking a continuing series of drug violations by aiding and abetting the drug violations of the actual illegal drug manufacturer. The problem with this theory is that the CCE statute is to be applied to the leaders of illicit drug organizations, not their employees or independent contractors.

The CCE statute is a criminal statute which should be

reasonably read according to its plain meaning as part of the regulatory scheme set up by Title 21, and in particular § 841.[2] The Government urges making CCE kingpins out of persons who are not heading organizations which import, distribute or manufacture drugs, but who, at best, only aid and abet such conduct.

An analogous reigning of the attempt to expand the statutory sweep of a statute occurred in Reves et al. v. Ernst & Young, __ U.S. __ (March 3, 1993), where this Court affirmed a lower court's ruling that the defendant accounting firm's activities did not rise to the level of a violation of the RICO statute.[3]

Under the RICO statute, the conduct which rises to the

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[2] In United States v. Pino-Perez, 870 F.2d 1230, 1239-1241, the dissenting opinion notes that treating an aider and abettor as a kingpin on the authority of § 2(a) is to demolish the carefully graduated structure of penalties under § 841.

[3] RICO § 1962(c) states that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c).

level requiring enhanced penalties is the employment or association "with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs" [Emphasis added]

In Reves, the Court affirmed the Eighth Circuit Court of Appeals holding that "before liability is appropriate: 'A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.'" 937 F.2d 1310, at 1324. This is language similar to the CCE statute.

The Eighth Circuit went on to state: "[i]n the course of this involvement it is clear that Arthur Young committed a number of reprehensible acts, but these acts in no way rise to the level of participation in the management or operation of the Co-op." 937 F.2d at 1324.

Defendant Ernst & Young took over the 1981 and 1982 audit reports for The Farmer's Cooperative of Arkansas and

Oklahoma, Inc. (the Co-Op) after its general manager and accountant were convicted of tax fraud in January 1981. The Co-Op had invested in a gasohol plant under the advice of its former general manager (who was also a part owner in the plant.) The investment was a loss.

When Ernst & Young presented financial statements, they omitted information contained in the audit's note that the gasohol plant was averaging a loss of about $100,000 per month. In contrast, the statement listed the plant as a $4.5 million dollar asset. The members of the Co-Op were never informed that the Co-Op was in financial difficulty if the gasohol plant were written down to its fair value. In February of 1984, when it was unable to acquire further financing, the Co-Op filed for bankruptcy.

This Court held that the "narrow question in this case is the meaning of the phrase 'to conduct or participate directly or indirectly, in the conduct of the enterprise's affairs.'"

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the

absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" quoting United States v. Turkette, 452 U.S. 576, 580 (1981).

The Court held that within the context of § 1962(c) "participate" appears to have a narrower meaning. We may mark the limits of what the term might mean by looking at what Congress did *not* say. On the one hand, "to participate ... in the conduct of ... affairs" must be broader than "to conduct affairs" or the "participate" phrase would be superfluous. On the other hand, as we already have noted, "to participate ... in the conduct of ... affairs" must be narrower than "to participate in affairs" or Congress' repetition of the word "conduct" would serve no purpose. It seems that Congress chose a middle ground, consistent with a common understanding of the word "participate" - "to take part in." quoting *Webster's Third New International Dictionary* 1646 (1976). Thus, the accounting firm was held not part of the RICO organization because it did

not participate in the conduct of the enterprise.[4]

The language of the CCE statute must similarly be limited by its words to the actual drug kingpins, not businesses which in some way cater to drug criminals. To hold otherwise is to expand the sweep of CCE liability to encompass not only true drug overlords, but also to those who merely aid and abet them -- in other words, every person within the CCE organization and those on the outside who assist as well.[5]

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[4] In Reves, the court did not have to resort to the rule of lenity because the plain meaning controlled the outcome of the case. If the plain meaning does not control here, then the rule of lenity, which requires ambiguity in the words of a statute to be resolved in favor of the defendant. "When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." Bell v. United States, 349 U.S. 81, 832 (1955). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Ladner v. United States, 358 U.S. 169, 178 (1958), and quoted in Simpson v. United States, 435 U.S. 6, 15 (1978).

[5] As noted in footnote 14 of the Petition (at p. 21), the intent of the CCE statute to cover only those kingpins who supervise an actual illicit drug enterprise is section 848(b). That section of the CCE statute states that for enhanced CCE status (the so-called "super CCE kingpin"), the predicate crimes must involve at least 300 times the quantity of controlled substances described in 21 U.S.C. 848(b)(1)(B). This evinces an intent that CCE liability be for supervisors of large-scale illicit drug organizations and not peripheral suppliers of precursors to

The very reason the federal courts developed the "employee" exception to CCE liability requires that other non-drug lord abettors also be excluded. Otherwise, there are no meaningful limits to the sweep of the CCE statute whose harsh penalties are meant for those top brass of illicit drug organizations, not underlings upon whom the kingpins depend for the operation of their enterprise.

Of course, anyone who aids and abets a crime is guilty as a principal (18 U.S.C. § 2), as the Government urges. Gov't Brf., 9. However, there must be a reasonable limitation on the interpretation of the words in section 848 (C), or the intent of Congress to impose the harshest penalties for the most deserving will be frustrated. That interpretation is governed by the plain meaning of the words that the drug kingpin himself must "violate" the provisions of Title 21 on a continuing basis and in concert with five or more supervised persons.

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drug manufacturers. Petitioner could not qualify for this status because neither he nor his employees ever sold a controlled substance, unless petitioner's liability in this regard is to be determined by the amount of controlled substances the buyer decides to manufacture.

Interpreting the language "he violates" as permitting an aiding and abetting predicate substantially expands the scope of the statute beyond its intended targets. Thus, a person who runs a bodyguard service for a kingpin would himself be a kingpin if he supervises five underling bodyguards who allow the drug kingpin to go about his drug business unmolested by his competitors or the law. The same may be said for an accounting firm, law firm, or any other service supplier with over five employees who assist in some way a drug kingpin.

The Government's states that "because drug kingpins are often removed from direct involvement in the drug activities that they manage or supervise, a rule prohibiting the use of aiding and abetting as a basis for CCE liability could insulate some of the very defendants that the CCE statue was designed to reach." Gov't Brf., 9. This is overstated. The fundamental basis for CCE liability is that the kingpin head a drug organization. That essential element does not exist here. Further, such kingpins will face liability under a variety of

predicates, most often as a principal,[6] but certainly always as the head conspirator of the drug operation. And certainly, a true drug kingpin, like all other defendants, would face criminal liability for the predicate and other crimes committed.

B. The Statute Does Not Permit the Use of Aiding and Abetting of the Predicate Drug Offenses to Make Business Persons Such as Petitioner a Drug "Kingpin."

This subargument obviously blends with the previous one -- if CCE only applies to the heads of drug organizations, then it would not apply to persons who merely aid and abet persons who manufacture drugs. The Government asserts that the conflict in the circuits which petitioner identifies[7] need not

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[6] As in United States v. Aiello, 864 F.2d 257, 259 (2nd Cir. 1988), where Aiello was the undisputed leader of a heroin and cocaine distribution network who himself sold a kilo of heroin on one occasion while on other occasions he constructively possessed it. The Second Circuit distinguished its decisions in Amen (831 F.2d 373) and Benevento (836 F.2d 60) because there the defendants there were not "kingpins" of drug organizations and thus could not be convicted of a § 848 based on their aiding and abetting the kingpin. (864 F.2d at 263-64). The same distinction applies to petitioner.

[7] The Second Circuit holds that one cannot be convicted of a being a kingpin solely based upon a theory of aiding and abetting a kingpin; the Seventh Circuit disagrees. The Ninth Circuit appears to agree with the Second Circuit. *See* United States v. Miskinis, 966 F.2d 1263, 1267 (9th Cir. 1992)See Pet., 23-25; Gov't Brf., 8. The issue is relevant to this case because the Government's position, as stated in

be resolved here because petitioner was convicted as a kingpin himself and not merely as an aider and abettor of a kingpin. Gov't Brf., 8.

The issues are not so distinct. Petitioner is claimed to be a kingpin, but not of a drug organization; he ran a legitimate[8] chemical supply company. The predicate for CCE liability was his alleged aiding and abetting his customers who allegedly manufactured methamphetamine after they bought the precursor chemicals from petitioner's business.

In United States v. Pino-Perez, 870 F.2d 1230, 1239, the dissenting opinion notes that the majority opinion holds that "the kingpin's subordinates may not be convicted as aiders and

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its brief, is that there is no limitation on the scope of aiding and abetting liability as the Second Circuit has held. Gov't Brf., 9, quoting United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. *en banc* 1989), *cert. denied*, 110 S.Ct. 260 (1990), with approval for the proposition that § 2(a) of Title 18 applies to the entire criminal code.

[8] The Government impliedly criticizes this description. By it, petitioner means no more than this: there was nothing illegal about petitioner's inventory of chemicals nor in their sale. He ran an otherwise legal business operation. One of the questions before the court is whether petitioner crossed the obscure line of legality between United States v. Falcone, 311 U.S. 205 (1940), and Direct Sales Company v. United States, 319 U.S. 703 (1943).

abettors." It is not a difference of legitimate distinction to exclude employees of drug lords from CCE liability, but to permit such liability to someone who functions in an employee-like status.

Further, since "the government must show that the defendant aided and abetted the principal in every 'essential element' of the offense" (United States v. Jones, 678 F.2d 102, 105 (9th Cir. 1982), this theory does not apply to sustain a CCE conviction where the chemical supplier only supplies precursors as part of his business and has no further contact with the illicit manufacturer after the sale.

That Congress did not intend for persons such as petitioner to fall within the CCE net is further shown by the case law which holds that one who simply sells materials with knowledge that they are intended for use in the production of illicit substances may not be convicted as an aider and abettor or co-conspirator with the actual manufacturer of the substances. Here, the employee sales of chemicals to customers did not qualify as predicate violations of Title 21.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE AMBIGUOUS, IF NOT CONFLICTING, STANDARDS IN UNITED STATES V. FALCONE, 311 U.S. 205 (1940), AND DIRECT SALES COMPANY V. UNITED STATES, 319 U.S. 703 (1943).

The line between these two cases is not bright; it is faint to the eye and businesses will conduct themselves at their peril if the demarcation is not made plain. As one California case, speaking of the two cases, notes, "The two leading cases on this point face in opposite directions." People v. Lauria, 251 Cal.App.2d 471, 476, 59 Cal.Rptr. 628 (1967).[9]

Here, the Government argues that petitioner crossed the line between mere Falcone knowledge to Direct Sales intent because he purportedly had "a stake in the venture" of the buyers. Gov't Brf., 11.[10] The facts given to support this

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[9] Lauria, at 482, cites a classic case concerning a contract for the sale of tea at Dunkirk which was known to be destined for smuggling into England was not illegal. The contract was declared legal. Holmes v. Johnson, 98 Eng.Rep. 1120 (1775).

[10] The Government's reliance (at p. 10) on United States v. Michelena-Orovio, 719 F.2d 738 (5th Cir. 1983), is meritless given the fact that the defendant there was "himself a member of a segment of an extensive conspiracy to obtain marijuana and distribute it...." (id. at 750).

conclusion are that petitioner moved his primary location at times to avoid local reporting requirements, that his employees told customers what stores sold chemicals free of reporting requirements, and that the business offered customers price discounts to those who bought in volume.

The latter point concerning discounts could be said of just about every wholesale or retail business in America. As to the direction to customers to buy unregulated ephedrine from stores in Orange County or outside the state of California, that direction could not play a role in any of the predicate crimes in this case because if customers followed the advice, they would then have made purchases outside the Southern District of California. Cf., Falcone, at 208, *see especially* fn. 1 (evidence against the defendants such as increased sales of sugar, selling at higher prices, delivery of 1 1/2 ton quantity of yeast, and registering company in name of another deemed insufficient).

Also, counterbalancing the Government's points as to any "stake in the venture" of the buyer's illicit activity are the stipulated facts that the petitioner's business never gave credit

to customers, did not loan them money, and received no money from the customer other than for the purchase of the product sold.[11] Employees were instructed not to give advice on chemical procedures relevant to the manufacture of methamphetamine. E.C.R. 41-45. *See also* Pet. 34, concerning other examples of petitioner's efforts to operate within the law (*e.g.*, advice of counsel). Additionally, at the same time of these sales of precursor chemicals by petitioner, a DEA public relations agent was informing the public through the news and TV media that the Government believed that the knowing sales of such precursors substances to a drug manufacturer was not illegal. *See* next argument.

Unless the words "stake in the venture" have lost substantive content and meaning, it cannot be said that

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[11] The Government argues that giving discounts for volume purchases shows a "stake in the venture." In reality, selling the precursors at grossly inflated prices would be more persuasive in showing an intent to profit by the illegal activity of the customer. *See* People v. Lauria, 251 Cal.App.2d 471, 478 (1967), relying on Regina v. Thomas, 2 All Eng. 181 342 (1957)(landlord rents prostitute room for five hours per night a gross inflated rate; held, sufficient to show he lived off earnings of prostitution).

petitioner had such a connection in the manufacture of illegal drugs. In any event, this is an area in need of the further definition by this court.

III. THE DENIAL OF DISCOVERY OF GOVERNMENT DOCUMENTS RELATING TO THE LEGALITY OF SELLING PRECURSOR CHEMICALS DENIED PETITIONER DUE PROCESS OF LAW.

The Government denies the materiality of the requested internal documents because there is no claim petitioner saw or relied on them. Gov't Brf. 11-12. Whether petitioner saw these documents is irrelevant to their materiality to his estoppel and *mens rea* defenses. Petitioner needed the internal documents to show that the statements in the public media by the DEA's public relations representative reflected Governmental policy to the effect that sales of precursor chemicals was perfectly legal.[12]

Petitioner was entitled in conducting his business to rely

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[12] In the January 17, 1986 edition of the **San Diego Tribune**, DEA Agent D'Ulisse was quoted as stating: "Most responsible chemical companies won't sell ephedrine because there is no legitimate chemical use for it. But other places sell it legally. You can walk in, slip them a note and get everything you want to make it."

on official public media pronouncements, particularly if they were backed by internal legal opinions of the Government. Petitioner requested the internal documents to pursue his defense based upon the Government's publicly stated position concerning the legality of open sales of precursors by chemical supply companies which had gone of for years without warning of the purported illegality. Since the major dividing line between legal and illegal conduct, between mere knowledge of the buyer's intention and "a stake in the venture" of the buyer's illegal conduct, is the knowledge of the illegality of the conduct and a stake in it, the requested information was critical for petitioner to show he had no unlawful intent and that that he was, in the estoppel sense, "authorized" to sell as he did. With the discovery, the petitioner would then mount such defenses as proffered in his motion for discovery. *See* Pet. 41-48.

The Government's blunderbuss response that petitioner "cannot claim that he or any member of his staff was told by a DEA agent that it was legal to assist the illegal manufacturers of methamphetamine" (Gov't Brf., 13), is self-evidently

meritless. The discovery motion could not be determined by such a generalization. Rather, the evidence sought concerning the Government position on the legality of sales of unrestricted precursor chemicals would have been material to petitioner's defenses that he lacked a *mens rea* to violate Title 21, and that he was authorized to sell such chemicals to anyone who wanted to buy them. Such evidence would have been admissible to sustain instructions on the issues of lack of criminal intent as well as the separate defense of "authorization." Fed.R.Crim.Proc. 12.3. This and other evidence in turn would have supported argument to the trier of fact. The latter then would have been entrusted with making the ultimate decision.

Having been precluded from the most basic form of discovery after a substantial showing that the Government certainly had the material requested,[13] petitioner was hardly in

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[13] As to its contacts with petitioner's business, the DEA certainly would have that information available. Further, it is equally certain that the DEA's media representative was not off on a frolic of his own in giving multiple newspaper and TV interviews lamenting the fact that it was perfectly legal for San Diego based chemical companies to sell the then unregulated precursor chemicals for methamphetamine to any person who wanted them. Indeed, in legal arguments to the Ninth

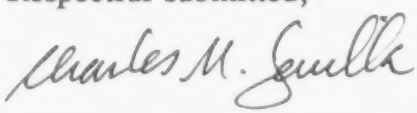
a position to make his case for either defense theory.

Whether the standard governing this issue is Brady v. Maryland, 373 U.S. 83, 87 (1963), as a due process violation, or an improper denial of Rule 16 discovery,[14], the denial of this material prevented the mounting of the twin defenses of "authorization" and lack of *mens rea*.

CONCLUSION: For the reasons in the petition and this reply, a Writ of Certiorari should be granted.

March 24, 1993

Respectful submitted,



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Circuit, the Government essentially stated the same thing. United States v. Howard, 828 F.2d 552, 555 (9th Cir. 1987)(that RJM laboratories legally sold chemicals and supplies). There was no legitimate basis to deny this basic discovery to petitioner to allow him to mount his defense.

[14] *See also* United States v. Agurs, 427 U.S. 97, 103 (1976)(prejudice exists "if omitted evidence creates a reasonable doubt that did not otherwise exist"). The denial of requested favorable evidence requires a new trial if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (United States v. Bagley (1985) 473 U.S. 667, 682).